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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 801

TAWANDA R. SIMMONS, - - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

SANDRA LEE SIMMONS SHAW, - - *Petitioner,*

v.

LOUIS E. WOLFSON, ET AL., - - *Respondents.*

BRIEF FOR RESPONDENTS, WOLFSON, GERBERT, STAUB, BAKER, HOOVER, KOSOW AND SHERMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

OPINIONS BELOW.

The per curiam Opinion of the United States Court of Appeals for the Sixth Circuit, is printed in Petitioners' "Appendix B" at page 42 and is reported at 428 F. 2d 455. The Opinions of the United States District Court for the Western District of Kentucky (Brooks, J.) are printed in Petitioners' "Appendix A" at pages 23 and 32 and are unreported.

JURISDICTION.

The Petitioners have invoked the authority of this Court under 28 U.S.C. §1254(1). The jurisdiction of the United States District Court was based on 15 U.S.C. §77v and 15 U.S.C. §78aa.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

I. Whether Petitioners, in order to recover under the Securities Acts for an alleged fraud involved in the sale of securities, must be purchasers and sellers of said securities?

II. Whether an action to recover for an alleged fraud on a corporation must be brought by or on behalf of the corporation rather than by each shareholder bringing an individual suit to recover for damage to his individual holding?

STATUTORY PROVISIONS.

The Statutes relied on and set forth by the Petitioners are provisions of the Securities Act of 1933, 15 U.S.C. §77a, *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78a, *et seq.*, and being 15 U.S.C. §77l, 15 U.S.C. §77m, 15 U.S.C. §77q, 15 U.S.C. §78l, 15 U.S.C. §78j, 15 U.S.C. §78n and 15 U.S.C. §78t, all of which are set forth in "Appendix C" to Petitioners' Brief at page 45. In addition, 15 U.S.C. §77v and 15 U.S.C. §78aa are involved and are set forth in the Appendix to this brief at pages 13 and 14.

The regulation involved is Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. §240.10b-5, and is set forth in "Appendix C" of Petitioners' brief at page 53.

COUNTER-STATEMENT OF THE CASE.

This brief is filed on behalf of the following named Respondents who were defendants in the actions in the United States District Court: Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover, Joseph Kosow, and Isadore Sherman.

The case as stated in the Petitioners' Brief may be greatly simplified without loss to any material facts. In essence, the dismissed complaints (R. App., pp. 16 and 32) charged that the Respondents conspired to sell stock of the Merritt-Chapman & Scott Corporation to the Merritt-Chapman & Scott Corporation at artificially high prices induced by fraud and manipulation of the market by the Respondents. The Complaints do not allege that either Petitioner (plaintiffs below) purchased, sold, exchanged or in any way parted with or gained possession of any securities after the time the alleged fraud took place. The Petitioners brought separate actions as individual shareholders alleging that damage to the corporation from purchasing its own stock at fraudulently high prices caused damage to the Petitioners' individual holdings. Neither of the Complaints attempted to state any cause of action in a representative or derivative capacity. In fact, the Complaints specifically disclaim any cause of

action on behalf of the corporation or any other shareholders (R. App., pp. 27 and 44).

Because none of the Respondents were residents of Kentucky and none were served with process in the district in which the actions were brought, the District Court could only acquire jurisdiction by the special jurisdictional provisions of the Securities Act of 1933 (15 U.S.C. §77v) or the Securities Exchange Act of 1934. (15 U.S.C. §78aa) The District Court found that no cause of action was stated under the Securities Act of 1933 (15 U.S.C. §77a, *et seq.*) or the Securities Exchange Act of 1934 (15 U.S.C. §78a, *et seq.*) and dismissed the complaints for lack of jurisdiction. (P. App., pp. 23 and 24) The United States Court of Appeals for the Sixth Circuit affirmed in a per curiam opinion. (P. App., p. 42)

The Petitioners charged in their complaints that those Respondents who were directors of the Merritt-Chapman & Scott Corporation conspired with those Respondents who were not directors of the corporation to purchase stock of the corporation and sell it to the corporation at great profit through fraud and manipulation of the market price. The Petitioners also allege that this fraudulent scheme was not disclosed to the shareholders of the corporation in the various reports and statements sent to the shareholders.

The complaints do not allege that either Petitioner was a purchaser or seller of securities in reliance on a fraud. The allegation is that the corporation was the purchaser. The Petitioners admit that they are not purchasers or sellers (Pet. for Cert., p. 10), and argued

that when the corporation is injured their interest in the corporation is injured thus entitling them, as shareholders, to bring individual actions.

The Petitioners seek to recover damages for injury to their shares in the corporation resulting from the damage to the corporation, and seek to recover for themselves from the Respondents a share of the illegal profits allegedly made by the Respondents because of the complained of fraud and manipulation.

ARGUMENT.

Rule 19 of this Court states that a Writ of Certiorari will be granted only where there are special and important reasons therefor. In particular, as applied to this Petition, the character of said reasons is normally limited to cases where one of the following circumstances exists:

I. A conflict between the lower court decisions and decisions of this Court.

II. A conflict of decisions among the Courts of Appeals.

III. A decision involving an important question of Federal law which has not been, but should be, settled by this Court.

IV. A decision involving an important state question in a way conflicting with applicable state law.

I.

There Is No Conflict Between the Lower Court Decisions and the Decisions of this Court.

Petitioners argue that the holding in *J. I. Case Co.* v. *Borak,* 337 U. S. 426 (1964), is in conflict with the decisions of the District Court and the Court of Appeals in this case. Of course, that case dealt with §14(a) of the 1934 Act (15 U.S.C. §78n) and the Petitioners here have not alleged that there was any wrongful solicitation of a proxy. The Petitioners' allegation is that there was a fraudulent sale of stock to the corporation in defiance of §10b (15 U.S.C. §78j) of the 1934 Act. Neither the decisions of the District Court nor the Circuit Court have denied any protection to the purchaser, the Merritt-Chapman & Scott Corporation. There is nothing in the *Borak* case which implies an individual right of action to shareholders of a corporation which has been fraudulently induced to purchase its own stock.

Next the Petitioners argue that the decisions of the District Court and the Court of Appeals are in conflict with the decision of this Court in *Securities & Exchange Commission* v. *National Securities, Inc.,* 393 U. S. 453 (1969). However, in that case it is clear that in order to grant relief under §10b of the 1934 Act, the plaintiff must be a purchaser or seller of the securities involved. This Court in that case did hold that someone who was fraudulently induced to exchange or otherwise transfer securities was a purchaser or seller within the meaning of §10b. The

Court of Appeals for the Sixth Circuit recognized the rule of the *National Securities* case, *supra,* in *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968), *cert. denied* 394 U. S. 903 (1969), but found the rule of that case inapplicable in the instant action because there was no exchange or transfer.

The Petitioners are seeking complete disregard of the purchase and sale rule in order to allow recovery. No decision of the Supreme Court has ever disregarded this statutory phrase, and no conflict of the lower court decisions and the decisions of this Court exists:

II.

There Is No Conflict of Decisions Among the Courts of Appeal.

The decisions among the various Courts of Appeals are uniform in their agreement that in order to recover under Rule 10b the action must be brought by a purchaser or seller of the securities involved. The Court of Appeals in this case did not deny that a corporation has a right to recover damages where it is defrauded in the purchase or sale of stock. Nor is there any denial that if the directors and officers of the corporation refuse to take action to recover the damage a derivative action may be brought by a shareholder. Thus, the following cases cited by the Petitioners as conflicting were derivative actions which held that the proper action by plaintiff was through derivative methods rather than by an individual action: *Fischman* v. *Raytheon Mfg. Co.,* 188 F. 2d 783 (2nd Cir.

1951); *Ruckle* v. *Roto American Corporation,* 339 F. 2d 24 (2nd Cir. 1964); *Dasho* v. *Susquehanna Corporation,* 380 F. 2d 262 (7th Cir. 1967), *cert. denied* 389 U. S. 977 (1967); *Pappas* v. *Moss,* 393 F. 2d 865 (3rd Cir. 1968). Each of these cases holds that where the corporation is the purchaser, seller or issuer of the stock, the action must be brought in the name of the corporation. There is no conflict between these cases and the instant action.

The other cases cited by the Petitioners to indicate inconsistency among other Courts of Appeals with the decisions in this case are cases where the individual involved actually bought, sold, transferred or exchanged stock, or had contracted to do so, and thus had a right of individual action. These cases are in complete conformity with the decision here challenged. *Hooper* v. *Mountain States Securities Corporation,* 282 F. 2d 195 (5th Cir. 1960), *cert. denied* 365 U. S. 814 (1961). *Matheson* v. *Armbrust,* 284 F. 2d 670 (9th Cir. 1960), *cert. denied* 365 U. S. 870 (1961). *Stevens* v. *Vowell,* 343 F. 2d 374 (10th Cir. 1965). *Vine* v. *Beneficial Finance Company,* 374 F. 2d 627 (2nd Cir. 1967), *cert. denied* 389 U. S. 970 (1967). *A. T. Brod & Co.* v. *Perlow,* 375 F. 2d 393 (2nd Cir. 1967). Each of the above cases shows that there is uniformity among the Courts of Appeals, not a conflict.

The Petitioners have failed to note the two most recent cases which demonstrate that there has been no change of position in Court of Appeals for the Second Circuit, where the majority of the cases of this nature are litigated. *Greenstein* v. *Paul,* 400 F. 2d 580 (2nd

Cir. 1968). *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d 963 (2nd Cir. 1968), *cert. denied* —— U. S. ——, 26 L. Ed. 2d 561, 90 S. Ct. 2199 (June, 1970). These two cases are directly in point on the questions here involved. Also recent decisions in the Fifth and Eighth Circuits have reaffirmed the purchase and sale rule. *Erling* v. *Powell*, CCC FED. SEC. L. REP. ¶92,734 (8th Cir. July, 1970. *Herpich* v. *Wallace*, CCH FED. SEC. L. REP. ¶92,734 (5th Cir. July, 1970). These cases demonstrate clearly that there is no conflict among the circuits in regard to the answers to the two questions presented.

III.

The Decision of the Court of Appeals Does Not Involve an Important Question of Federal Law Which Should Be Settled by This Court.

The Supreme Court has recognized that to recover under §10b of the 1934 Act the claimant must be a purchaser or seller of the security involved. This recognition was made most recently in the *Securities and Exchange Commission* v. *National Securities, Inc.*, *supra*. There it was recognized that the claimant must be a purchaser or seller, and a purchaser or seller was defined as someone who had made an exchange or transfer of stock in reliance on fraud. In the present case, there was no allegation of purchase, sale, exchange or transfer.

The question of federal law involved here was settled by Congress in passing the 1934 Act when it required that recovery under §10b is limited to a pur-

chaser or seller of the security. There is no question left to be settled by the Supreme Court without striking down the entire section of the Act.

IV.

This Decision Does Not Involve an Important State Question Decided in Conflict With Applicable State Law.

If the Court of Appeals had decided in favor of the Petitioners, great violence would have been done to the corporation law of every state in the nation. The Respondents know of no state or federal court which has held that where a corporation is defrauded by its directors an action for damages is properly brought in some name other than that of the corporation. To allow each individual shareholder to bring an individual action for the damage caused the corporation would be to ignore the entity of the corporation. Its right to recover for its damages would be lost or severely limited unless both the corporation and the shareholder were allowed separate recovery from the director for the same wrong. Moreover, the alleged wrongdoers would be forced to defend themselves in each district where a shareholder chose to file suit. If such a situation were allowed to prevail the entire structure of corporate law would be struck down. Nothing could be more conflicting with the applicable laws of every state. The Court of Appeals for the Sixth Circuit clearly recognized this proposition in its decision in the case at bar when it stated that the corporation is a necessary party to this action. Any other finding would lead to corporate chaos.

CONCLUSION.

There are no special or important reasons to grant a Writ of Certiorari in this case. The Supreme Court and the Courts of Appeals have uniformily held and are in total agreement with the decision of the Court of Appeals in the instant case. No court has gone so far as to allow recovery under §10b of the 1934 Securities Exchange Act to a claimant who did not purchase, sell, transfer or exchange the securities involved. Nor has the Supreme Court nor any Court of Appeals ever allowed direct individual recovery by a corporate shareholder in a case where the allegations show that it was the corporation itself which was damaged. Such recovery must be in the name of the corporation.

The Respondents respectfully submit that there is no question presented worthy of review by this Court, and request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

WILSON W. WYATT,
EDGAR A. ZINGMAN,
ROBERT C. EWALD,
WYATT, GRAFTON & SLOSS,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,

Counsel for Respondents, Wolfson, Gerbert, Staub, Baker, Hoover, Kosow and Sherman.

JURISDICTIONAL SECTIONS OF SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934.

§ 77v. Jurisdiction of offenses and suits.

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear bfore the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey

such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. May 27, 1933, c. 38, Title I, § 22, 48 Stat. 86; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 10, 1954, c. 667, Title I, § 11, 68 Stat. 686.

§ 78aa. Jurisdiction of offenses and suits.

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations,

may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, § 32(b) 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 6095

Tawanda R. Simmons,
118 Blankenbaker Lane,
Louisville, Kentucky, - - - - - Plaintiff,

v.

Louis E. Wolfson,
6466 North Bay Road,
Miami Beach, Florida,

Elkin B. Gerbert,
Universal Marion Building,
Jacksonville, Florida,

Marshall G. Staub,
99 Park Avenue,
New York, New York,

Robert C. Baker,
c/o American Security & Trust Company,
15th and Pennsylvania Ave., NW,
Washington, D.C.,

Robert W. Hoover,
99 Park Avenue,
New York, New York,

Joseph Kosow,
200 Bold Pate Road,
Newton, Mass.,

Alexander Rittmaster,
860 Channel Road,
Woodmore, Long Island, N.Y., - - Defendants.

COMPLAINT—Filed December 5, 1969.

I. JURISDICTION.

This Court has jurisdiction of this action under the provisions of Section 22 of the Securities Act of 1933 (U.S.C.A., Title 15, Sec. 77v), Section 27 of the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sec. 78aa), and 28 U.S.C. Section 1337, and this Court has pendant jurisdiction of so much of this action as is based upon state law pursuant to the principles of law enunciated by the United States Supreme Court in Hurn v. Cusler, 289 U.S. 238 and United Mine Workers of America v. Gibbs, 383 U.S. 715, 89 S. Ct. 1130, 16 L ed 2d 218, all as hereinafter more particularly appears.

II. THE PARTIES.

A. The Plaintiff.

Plaintiff is an adult resident citizen of Jefferson County, State of Kentucky, which is within the division of this judicial district. She has been during all the times referred to herein and is the owner of certain shares of common stock of a corporation known as Merritt, Chapman & Scott Corporation, which corporation's common stock during all the times referred to herein was listed and registered on and traded on a national stock exchange, namely the New York Stock Exchange, New York, New York.

B. The Defendants.

Plaintiff states, on information and belief, that:

1. The defendants, Louis B. Wolfson and Elkin B. Gerbert, are residents of the State of Florida. The defendants, Marshall G. Staub, Robert W. Hoover and Alexander Rittmaster, are residents of the State of New York. The defendant, Robert C. Baker, is a resident of the District of Columbia. The defendant, Joseph Kosow, is a resident of the State of Massachusetts.

2. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert W. Hoover, Alexander Rittmaster and Robert C. Baker, were during some or all of the times referred to herein, directors and/or officers of the corporation, Merritt, Chapman & Scott Corporation. The defendant, Joseph Kosow, was a part of the scheme and conspiracy with the other defendants as hereinafter set out and described.

3. The defendants, as officers and/or directors of Merritt, Chapman & Scott Corporation, used the mails of the United States Government and various means of interstate commerce to carry out the schemes and conspiracy hereinafter referred to and used such means to issue and deliver proxy statements and financial statements which failed to state facts which kept said statements from being false and misleading to plaintiff.

4. At times relevant to this action the defendants, who are or were officers and/or directors of said corporation, directly or indirectly controlled and were controlling persons of Merritt, Chapman & Scott Corporation within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934.

5. Defendant, Louis E. Wolfson, members of his family, and their associates and companies in which they held a substantial and controlling interest, have, during all the times referred to herein, dominated and controlled the Board of Directors, officers, management, policies, finances, and business affairs of the corporation, Merritt, Chapman & Scott Corporation.

6. The officers and directors of Merritt, Chapman & Scott Corporation did not act independently, but were submissive to the direction, control, orders and instructions of Louis E. Wolfson.

7. The defendants violated the provisions of the Securities Act of 1933, 15 U.S.C.A., Section 77a, et seq. and

the Securities Exchange Act of 1934, 15 U.S.C.A., Section 78a, et seq., the Rules and Regulations of the Security Exchange Commission pursuant thereto and state law, as hereinafter set out.

III. ALLEGATIONS RESPECTING VENUE.

The sale to plaintiff of said securities, the delivery of said securities to plaintiff, the delivery of false and misleading proties, notices, financial statements and various communications took place in Jefferson County, Kentucky, within this division of this judicial district. The defendants controlled Merritt, Chapman & Scott Corporation and arranged for and held corporate meetings of Merritt, Chapman & Scott Corporation in Jefferson County, Kentucky and during part of the times referred to herein, Merritt, Chapman & Scott Corporation controlled a subsidiary corporation whose offices and plants were located in Jefferson County, Kentucky.

IV. COUNT ONE.

1. This action arises under the Securities Act of 1933, the Securities Exchange Act of 1934, and under State law.

2. Plaintiff is and has been since 1959 the owner of 2,600 shares of common stock of Merritt, Chapman & Scott Corporation, which stock during all the times referred to herein was traded on a national security exchange, namely, the New York Stock Exchange, New York, New York. The total number of shares of common stock outstanding is 1,889,693.

3. The defendants, except Joseph Kosow, were, during the times referred to herein, and some still are, officers and/or directors of Merritt, Chapman & Scott Corporation. The defendant, Joseph Kosow, an officer and director of a subsidiary corporation of Merritt, Chapman & Scott Corporation, namely, Industrial Finance Corporation, engaged

in a conspiracy with the other defendants herein, all in violation of the aforesaid statutes and law and to damage of plaintiff.

4. During the period from 1961 to 1964, the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, officers and/or directors and former officers and/or directors of Merritt, Chapman & Scott Corporation, so conducted themselves in their capacity as such and conspired with others, including the defendant, Joseph Kosow, to have Kosow and such other persons acquire and buy common stock of Merritt, Chapman & Scott Corporation with the guarantee that the corporation, Merritt, Chapman & Scott Corporation, would repurchase said stock from them at a profit of approximately 20% to 25%. The defendant, Joseph Kosow, and the other defendants herein, conspired in a scheme whereby Kosow, at the instance of said defendants acquired 738,200 shares of common stock of Merritt, Chapman & Scott Corporation at prices of $8 to $12 per share and the defendants had the corporation repurchase said shares at prices varying from $14 to $19 per share, which profit had been guaranteed to Kosow, thereby paying out of corporate funds a sum in excess of $3,700,000.00 over the price for which the corporation could have acquired said stock directly, and in so doing the defendants unlawfully affected a series of transactions creating an actual or apparent active trading in such securities so as to raise the price of same for the purpose of inducing the purchase by others and used manipulative and deceptive devices and schemes which operated as a fraud and deceit on the corporation and this plaintiff as a stockholder in connection with the purchase of shares by said Kosow and others, and the sale of shares by said Kosow and others to the corporation, and the purchase by the corporation of said shares.

5. Defendant officers and/or directors of the corporation failed to reveal in financial statements and other reports the secret contracts, agreements and guarantees made by them respecting the repurchase agreements and the amount of profit guaranteed and paid to Kosow and other persons with whom they had such secret agreements.

6. Defendant, Kosow, formed a joint venture for the purpose of acquiring stock for resale to the corporation pursuant to this conspiracy with the other defendants, who were officers, directors and insiders, and said defendants failed to reveal such arrangements and such documents, agreements and guarantees to the plaintiff in the various communications sent plaintiff through the mail and thereby omitted to state a material fact necessary in order to make the statements and communications, in the light of the circumstances under which they were made, not misleading, all of which was not known to plaintiff and could not have been known to plaintiff as the defendants had conspired to keep said information secret and not to reveal same even to the Securities and Exchange Commission.

7. Defendants manipulated the market relative to common stock of Merritt, Chapman & Scott Corporation and created an artificial market in order to assist Kosow and his joint venturers, and others with whom they were dealing, in acquiring stock in the corporation, all in violation of the rules and regulations of the New York Stock Exchange and the Securities Exchange Commission and the Securities Act of 1933 and the Securities Exchange Act of 1934 and to the damage of the plaintiff in the value of her investment and return thereon.

8. The defendants conspired to conceal the various actions and transactions among themselves both from the Securities Exchange Commission, from the public and from this plaintiff, and represented to the corporation auditors that said transactions as to purchases by the corporation

were "arms length" transactions when in fact they were part of a conspiracy and fraud, thereby causing the reports and financial statements prepared by or approved by said auditors to be false and misleading.

9. The defendants knowingly caused Merritt, Chapman & Scott Corporation to conceal and omit to disclose and to misrepresent information as to the liability of the corporation to purchase the stock at a price above the then market price and as to payment of unreasonable salaries and compensation and as to losses for bad loans, in the various reports and statements mailed by them, as officers and directors, to this plaintiff through the United States mail, thereby making said communications in the light of the circumstances, false and misleading with respect to material facts and depriving this plaintiff of her right to know the true circumstances of the corporation.

10. The defendants made untrue statements of material facts and omitted to state material facts in various reports, proxies, financial reports and communications to the plaintiff, which were delivered by mail, which would keep said reports from being misleading, and which contained information which was not concurrent and was untimely, and certain of said defendants negligently permitted or aided and abetted the other defendants in doing these acts, with the intent and purpose of having the stockholders including this plaintiff, rely thereon.

11. The defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, caused a profitable business, Devoe and Raynolds Co., Inc., a subsidiary corporation, to be sold to obtain cash to carry on their conspiracy to acquire through others the common stock of Merritt, Chapman & Scott Corporation at prices in excess of what the corporation stock was selling at on the market, and in carrying out said scheme and conspiracy

failed to advise the plaintiff that said funds from said sale would be used to pay excessive profits to persons with whom they conspired to acquire said corporate stock, thereby using said funds to the detriment of this plaintiff.

12. The said devices, schemes, artifices, untrue statements of material facts, omissions to state material facts, acts, practices and courses of conduct of the defendants operated as a fraud and deception on plaintiff, in violation of Rule 10b(5), promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, and were in violation of the said security laws and the laws of the State of Kentucky and the State of New York, all to plaintiff's damage.

13. The defendants, in their secret guarantees to Joseph Kosow, his joint venturers and partners and to others, guaranteed and paid profits from 20% to 23% on the stock acquired and said defendants should be required to pay this plaintiff a comparable profit and defendant, Kosow, should be required to account to plaintiff for her proportionate share of the profits illegally and wrongfully made by reason of the conspiracy and to pay plaintiff the damages she has sustained.

14. Plaintiff states that when she purchased the aforesaid 2,600 shares of Merritt, Chapman & Scott Corporation common stock she relied on, as she had a right to do, the honesty and fair dealing of the company and those who controlled it and plaintiff states that as a result of the conspiracy practiced by the defendants and the fraud and deceit practiced on her and the corporation by the defendants in violation of the said statutes, she has been damaged in her stock interest in said corporation.

V. COUNT TWO.

Plaintiff reiterates the allegations heretofore made and further states:

1. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, who are or were during the transactions referred to, officers and/or directors of Merritt, Chapman & Scott Corporation, carried on various transactions with defendant, Joseph Kosow, and other persons, in illegally purchasing and having purchased the shares of common stock of Merritt, Chapman & Scott Corporation, in accordance with certain secret guarantees, and such actions were ultra vires and illegal and without corporate purpose, and contrary to represented policy of the corporation in diversifying and acquiring profitable enterprises, and said transactions prevented the corporation from engaging in and carrying out said stated policy, all to the damage of the corporation and this plaintiff.

2. The aforesaid defendants who are or were officers and/or directors of the corporation expended the funds of the corporation in acquiring shares of common stock at excessive prices from persons to whom defendants had made secret guarantees of profit, and in paying excessive prices for acquiring certain assets and corporations from persons with whom defendants conspired, and in paying excessive expenses, and in paying excessive insurance premiums to persons with whom they as insiders had a close relationship, and said expenditures constituted unlawful waste, diversion and gifts of assets of the corporation in violation of their fiduciary duties all to the damage of the plaintiff.

3. The said defendants, as officers and/or directors, occupied a fiduciary position with respect to the corporation of which they were officers and/or directors and owed a duty to said corporation, Merritt, Chapman & Scott Corporation, and its shareholders, including this plaintiff, to exercise a high degree of responsibility toward the corporation and this plaintiff's interest therein, and in their actions as here-

inabove set out, breached said fiduciary relationship, causing damage to plaintiff.

4. The said defendants who are or were officers and/or directors of Merritt, Chapman & Scott Corporation caused the corporation to acquire Industrial Finance Corporation, Hub Finance and Congress Finance at prices in excess of their fair and reasonable value, in order to benefit the sellers as against the interests of this plaintiff.

5. The said defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, conspired with defendant, Joseph Kosow, to acquire Industrial Finance Corporation. Said defendants had dealt with Kosow in acquiring shares of common stock of Merritt, Chapman & Scott Corporation and had a secret agreement regarding the repurchase from him of such shares at a profit to him. Through the purchase of Industrial Finance Corporation at a cost of $7,000,000.00 to Merritt, Chapman & Scott Corporation, the defendants conspired to pay defendant Kosow an excessive price for said corporation, said sum paid being approximately $3,000,000.00 above the fair and reasonable market value of said corporation, unjustly rewarding Kosow and depriving this plaintiff of her proportionate interest in said excessive amount of corporation assets.

6. The said defendants caused Merritt, Chapman & Scott Corporation to deposit with the American Security & Trust Company, Washington, D. C., of which the defendant, Robert C. Baker, is president, sums in excess of $8,500,000.00, to be used as additional collateral for personal loans of defendant, Louis E. Wolfson, with the agreement and understanding that said deposits would not draw interest in favor of the Merritt, Chapman & Scott Corporation, when the corporation was and should have been entitled to interest on such deposit, all to the damage of this

plaintiff as a stockholder, and defendants, Robert C. Baker and Louis R. Wolfson, should be required to reimburse plaintiff for her interest therein.

7. Plaintiff states that as a result of the actions and conspiracy of the defendants she was defrauded and suffered damages, all as more particularly set out below. Plaintiff states that the defendants, Louis R. Wolfson, Elkin B. Gorbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Bittmaster, through their actions in the corporation and on the Board of Directors represented that the corporation was buying in its own stock but that a material fact of the conspiracy was that the stock was being bought by the corporation at a price higher than was required and at a profit to persons with whom said defendants conspired, and that by failing to state to plaintiff in their proxies, reports, financial statements and communications these material facts, said defendants made a false representation to the plaintiff. The defendants knew the facts and knowingly made the representations intentionally leaving out of said representations material facts. Plaintiff states that these false representations were made to induce the plaintiff and others to rely thereon and defendants well knew that if they revealed to plaintiff and other stockholders the scheme and conspiracy they were working, the plaintiff and other stockholders would vote against them or sell their shares. Plaintiff states that the defendants as officers and/or directors, occupied a fiduciary position to the corporation and to her as a stockholder and she had a right to rly on the fact that they would reveal to her the true and accurate facts. Plaintiff states that she believed the representations made by the said officers and/or directors that they were buying the stock for the corporation's best interest, and that she had no way to learn or obtain knowledge of the true facts until certain of the defendants were tried in United States District Court of the

Southern District of New York in August, 1938, wherein it was revealed to the public that the defendants conspired with others to buy said stock and to guarantee to them a profit in an amount of approximately 20% to 25%. Plaintiff states that as a result of said fraud she has been damaged by reason of her inability to properly judge the value of said business and said shares and to take appropriate action in shareholders' meetings and to obtain a reasonable return on her investment.

VI. GENERAL ALLEGATIONS.

1. As to the above two Counts, plaintiff states that the corporation is dominated and controlled by defendant, Louis E. Wolfson and his family and persons and corporations which he controls and states that a demand on the corporation to bring an action against the defendant wrongdoers would be futile and useless as said Board of Directors would have to authorize such action and being under the control of defendant Louis E. Wolfson, and said defendant having been a part of said conspiracy herein referred to, said Board of Directors would refuse such action.

2. As to the above Counts, plaintiff states that her action is brought herein as an individual shareholder because any action on behalf of the corporation or by her on behalf of the other shareholders would inure to the benefit of the defendants, and particularly, Louis E. Wolfson, to the extent of their stock interests and such would be futile and unwarranted as they would be profiting from their own wrongs.

VII. DISCOVERY OF FACTS ALLEGED HEREIN.

The conspiracy, scheme, device, and fraud alleged herein was not brought to plaintiff's knowledge and was not discovered by plaintiff until the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staph and Joseph Kosow

were tried in the Southern District of New York on charges of violating the aforesaid Securities statutes in connection with the facts herein referred to on or about August, 1968. The facts alleged were revealed to plaintiff in the trial of the criminal cases and so plaintiff did not discover the facts alleged prior to one year next preceding the filing of this Complaint. Plaintiff further states that she could not have reasonably discovered said facts and said conspiracy prior to said time as said defendants conspired to keep such information secret.

Wherefore, plaintiff demands:

1. That she be awarded damages against the defendants and each of them in an amount equivalent to the percent profit defendants guaranteed and had the Corporation pay to others with whom they conspired, for the period of time she has held said shares, or the sum of $117,883.16.

2. That the defendants be required to account to the plaintiff for her share of such sums as they illegally authorized to be paid by the corporation in carrying out the conspiracy, in acquiring assets at a cost in excess of fair value and in paying out excessive expenses.

3. That she be awarded a sum that would compensate her for the difference in value between the present market value of her stock and the value of said stock had the defendants not perpetrated the conspiracy, waste and fraud on this plaintiff and had used said corporate assets to promote the proper business functions of the corporation.

4. That she be awarded her costs herein and a reasonable allowance for her attorney's fees, and for any and all other legal and equitable relief to which she may appear entitled.

(s) John G. Hicks,
716 Louisville Trust Building,
Louisville, Kentucky,
Attorney for Plaintiff.

DEMAND FOR TRIAL BY JURY.

Plaintiff respectfully demands trial by jury.
This the 5 day of December, 1968.

(s) John G. Hicks,
Attorney for Plaintiff.

State of Kentucky }
County of Jefferson } ss

Tawanda R. Simmons, being duly sworn, deposes and says: that she resides at 118 Blankenbaker Lane, Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing Complaint and knows the contents thereof, and that the same is true to her own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

(s) Tawanda R. Simmons.

AMENDED COMPLAINT.

Comes the plaintiff, Tawanda R. Simmons, and reiterates and reaffirms the allegations contained in her Complaint herein and for Amendment thereto states as follows:

1. Paragraph III "Allegations Respecting Venue" and Count One, Paragraph 11 are amended to add the following to each of said paragraphs:

The defendants who were Directors of Merritt-Chapman & Scott Corporation caused the Board of Directors of said Corporation to call its annual meeting of stockholders at the Brown Hotel, Louisville, Kentucky, on April 23, 1962, at which meeting the defendants voted to sell 400,000 shares of stock it owned in Devoe and Raynolds Company, Inc., a Subsidiary Corporation with main offices and plant in Louisville, Kentucky, thereby reducing the Corporation's ownership of said Subsidiary from 96% to approximately

65% and that said shares were sold to defendant, Rittmaster and his family, to Sherman and to others at a price of approximately $21.00 per share, which plaintiff believes was below the value of said stock. A copy of said Notice is attached hereto and marked "Exhibit A" to Amended Complaint. The defendants, who are or were Directors of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. and who controlled said Corporation caused the said Subsidiary to hold a special meeting of the shareholders on August 27, 1964, at the Brown Hotel in Louisville, Kentucky, copy of Notice of said meeting being attached hereto as "Exhibit B" to the Amended Complaint. At said meeting the defendants through their control of Merritt-Chapman & Scott Corporation voted the Devoe shares held by Merritt and voted to sell the assets of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. Thereafter the defendants through their control changed the name of Devoe and Raynolds, Inc. to Revday, Inc. and the latter Corporation reacquired the stock previously sold to Rittmaster and his family and Sherman, and others, at a price of approximately $42.00 per share, giving said persons a substantial profit at the expense of the Corporation and placing in their hands funds which plaintiff believes were used for acquiring the stock of Merritt-Chapman & Scott Corporation, pursuant to the conspiracy herein alleged. Certain of said funds from the sale of the assets of Devoe and Raynolds Company, Inc were used to acquire Industrial Finance Company from Merritt-Chapman & Scott Corporation. Thereafter Merritt-Chapman & Scott Corporation merged Revday, Inc. into Merritt. Plaintiff states that these actions and acts which took place in Jefferson County, Kentucky, were part of the conspiracy herein alleged and enabled the defendants to obtain funds to carry out the purchases herein referred to, all being part of the conspiracy herein alleged.

Wherefore, plaintiff demands as in her original Complaint.

John G. Hicks,
716 Louisville Trust Building,
Louisville, Kentucky,
Attorney for Plaintiff.

State of Kentucky }
County of Jefferson } ss

Tawanda R. Simmons, being duly sworn, deposes and says that she resides at 113 Blankenbaker Lane, Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing Amended Complaint and knows the contents thereof, and that same is true to her own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

(s) Tawanda R. Simmons.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 6258

Sandra Lee Simmons Shaw,
428 Hite Avenue,
Louisville, Kentucky, - - - - Plaintiff,

v.

Louis E. Wolfson,
6466 North Bay Road,
Miami Beach, Florida,
Now at: Florida Federal Prison Camp,
Eglin Air Force Base,
Fort Walton Beach, Florida,

Elkin B. Gerbert,
Universal Marion Building,
Jacksonville, Florida,
Now at: Florida Federal Prison Camp,
Eglin Air Force Base,
Fort Walton Beach, Florida,

Marshall G. Staub,
99 Park Avenue,
New York, New York,

Robert C. Baker,
c/o American Security & Trust Company,
15th and Pennsylvania Ave., N.W.,
Washington, D.C.,

Robert W. Hoover,
99 Park Avenue,
New York, New York,

Joseph Kosow,
200 Bold Pate Road,
Newton, Mass.,

continued on following page.

Isidore Sherman,
927 Lincoln Road,
(or 4925 Collins Avenue),
Miami Beach, Florida,
Archibald Kleven,
209 Washington Street,
Boston, Mass.,
Alexander Rittmaster,
860 Channel Road,
Woodmore, Long Island, N.Y., - - Defendants.

COMPLAINT—Filed June 16, 1969.

I. JURISDICTION.

This Court has jurisdiction of this action under the provisions of Section 22 of the Securities Act of 1933 (U.S.C.A., Title 15, Sec. 77v), Section 27 of the Securities Exchange Act of 1934 (U.S.C.A., Title 15, Sec. 78aa), and 28 U.S.C. Section 1337, and this Court has pendant jurisdiction of so much of this action as is based upon state law pursuant to the principles of law enunciated by the United States Supreme Court in Hurn v. Cusler, 289 U.S. 238 and United Mine Workers of American v. Gibbs, 383 U.S. 715, 89 S. Ct. 1130, 16 L ed 2d 218, all as hereinafter more particularly appears.

II. THE PARTIES.

A. The Plaintiff.

Plaintiff is an adult resident citizen of Jefferson County, State of Kentucky, which is within the division of this judicial district. She has been during all the times referred to herein and is the owner of certain shares of common stock of a corporation known as Merritt, Chapman & Scott Corporation, part of which is held in her own name and part of which is held in the name of Robert P. Simmons, as Custodian for Sandra Lee Shaw (now Sandra Lee Simmons

Shaw), of which she is the beneficial owner, which corporation's common stock during all the times referred to herein was listed and registered on and traded on a national stock exchange, namely the New York Stock Exchange, New York, New York.

B. The Defendants.

Plaintiff states, on information and belief, that:

1. The defendants, Louis E. Wolfson, Elkin B. Gerbert and Isidore Sherman, are residents of the State of Florida. The defendants, Marshall G. Staub, Robert W. Hoover and Alexander Rittmaster, are residents of the State of New York. The defendant, Robert C. Baker, is a resident of the District of Columbia. The defendants, Joseph Kosow and Archibald Kleven, are residents of the State of Massachusetts.

2. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert W. Hoover, Alexander Rittmaster and Robert C. Baker, were during some or all of the times referred to herein, directors and/or officers of the corporation, Merritt, Chapman & Scott Corporation. The defendants, Joseph Kosow, Isidore Sherman and Archibald Kleven, were part of the scheme conspiracy with the other defendants as hereinafter set out and described.

3. The defendants, as officers and/or directors of Merritt, Chapman & Scott Corporation, used the mails of the United States Government and various means of interstate commerce to carry out the schemes and conspiracy hereinafter referred to and used such means to issue and deliver proxy statements and financial statements which failed to state facts which kept said statements from being false and misleading to plaintiff.

4. At times relevant to this action the defendants, who are or were officers and/or directors and/or consultants of said corporation, directly or indirectly controlled and were controlling persons of Merritt, Chapman & Scott Corpora-

tion within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934.

5. Defendant, Louis E. Wolfson, members of his family, and their associates and companies in which they held a substantial and controlling interest, have during all the times referred to herein dominated and controlled the Board of Directors, officers, management, policies, finances, and business affairs of the Corporation, Merritt, Chapman & Scott Corporation.

6. The officers and directors of Merritt, Chapman & Scott Corporation did not act independently, but were submissive to the direction, control, orders and instructions of Louis E. Wolfson.

7. The defendants violated the provisions of the Securities Act of 1933, 15 U.S.C.A., Section 77a et seq. and the Securities Exchange Act of 1934, 15 U.S.C.A. Section 78a et seq., the Rules and Regulations of the Security Exchange Commission pursuant thereto and state law, as hereinafter set out.

III. ALLEGATIONS RESPECTING VENUE.

The sale to plaintiff of said securities, the delivery of said securities to plaintiff, the delivery of false and misleading proxies, notices, financial statements and various communications by the United States Mail took place in Jefferson County, Kentucky, within this division of this judicial district. The defendants arranged for and held corporate meetings of Merritt, Chapman & Scott Corporation in Jefferson County, Kentucky and during part of the times referred to herein, Merritt, Chapman & Scott Corporation controlled a subsidiary corporation whose offices and plants were located in Jefferson County, Kentucky.

IV. COUNT ONE.

1. This action arises under the Securities Act of 1933, the Securities Exchange Act of 1934, and under Sate Law.

2. Plaintiff acquired and sold common stock of Merritt, Chapman & Scott Corporation as follows:

50 shares purchased August 3, 1958
1,000 shares purchased July 17, 1959
900 shares purchased August 7, 1959
100 shares purchased August 10, 1959
200 shares sold 1960 and 1961.

Plaintiff now owns 1,850 shares of said stock. Said stock was at all times referred to herein traded on a national security exchange, namely, the New York Stock Exchange, New York, New York. The total number of shares of common stock of said corporation outstanding is 1,889,693.

3. The defendants, except Joseph Kosow, Isidore Sherman and Archibald Kleven, were, during the times referred to herein, and some still are, officers and/or directors of Merritt, Chapman & Scott Corporation. The defendant, Joseph Kosow, an officer and director of a subsidiary corporation of Merritt, Chapman & Scott Corporation, namely, Industrial Finance Corporation, engaged in a conspiracy with other defendants herein, all in violation of the aforesaid statutes and law and to the damage of plaintiff. Isidore Sherman and Archibald Kleven engaged in a conspiracy with the other defendants herein, all in violation of the aforesaid statute and law and to the damage of plaintiff.

4. During the period from 1961 to 1964 the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall C. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, officers and/or directors and former officers and/or directors of Merritt, Chapman & Scot Corporation, so conducted themselves in their capacity as such and conspired with others, including the defendants, Joseph Kosow, Isidore Sherman and Archibald Kleven, to have Kosow, Sherman and Kleven and such other persons acquire and buy common stock of Merritt, Chapman & Scott Corporation with the guarantee that the corporation, Merritt, Chap-

man & Scott Corporation, would repurchase said stock from them at a profit of approximately 20% to 25%. The defendants, Joseph Kosow and the other defendants herein, conspired in a scheme whereby Kosow, at the instance of said defendants acquired 738,200 shares of common stock of Merritt, Chapman & Scott Corporation at prices of $8 to $12 per share and the defendants had the corporation repurchase said shares at prices varying from $14 to $19 per share, which profit had been guaranteed to Kosow, thereby paying out of corporate funds a sum in excess of $3,700,000.00 over the price for which the corporation could have acquired said stock directly, and in so doing the defendants unlawfully effected a series of transactions creating an actual or apparent active trading in such securities so as to raise the price of same for the purpose of inducing the purchase by others and used manipulative and deceptive devices and schemes which operated as a fraud and deceit on the corporation and this plaintiff as a stockholder in connection with the purchases of shares by said Kosow, Sherman and Kleven and others, and the sale of shares by said Kosow, Sherman and Kleven and others to the corporation, and the purchase by the corporation of said shares.

5. Defendant officers and directors of the corporation failed to reveal in financial statements and other reports the secret contracts, agreements and guarantees made by them respecting the repurchase agreements and the amount of profit guaranteed and paid to Kosow, Sherman and Kleven and other persons with whom they had such secret agreements.

6. Defendant, Kosow, formed a joint venture for the purpose of acquiring stock for resale to the corporation pursuant to this conspiracy with the other defendants, who were officers, directors, and insiders, and said defendants failed to reveal such arrangements and such documents,

agreements and guarantees to the plaintiff in the various communications sent plaintiff through the mail and thereby omitted to state a material fact necessary in order to make the statements and communications, in the light of the circumstances under which they were made, not misleading, all of which was not known to plaintiff and could not have been known to plaintiff as the defendants had conspired to keep said information secret and not to reveal same even to the Securities and Exchange Commission.

7. Defendants manipulated the market relative to common stock of Merritt, Chapman & Scott Corporation and created an artificial market in order to assist Kosow, Sherman and Kleven and their venturers, and others with whom they were dealing, in acquiring stock in the corporation, all in violation of the rules and regulations of the New York Stock Exchange and the Securities Exchange Commission and the Securities Act of 1933 and the Securities Exchange Act of 1934 and to the damage of this plaintiff in the value of her investment and return thereon.

8. The defendants conspired to conceal the various actions and transactions among themselves both from the Securities Exchange Commission, from the public and from this plaintiff, and represented to the corporation auditors that said transactions as to the purchase by the corporation were "arms length" transactions when in fact they were part of a conspiracy and fraud, thereby causing the reports and financial statements prepared by or approved by said auditors to be false and misleading but failed to reveal to plaintiff they were false.

9. The defendants knowingly caused Merritt, Chapman & Scott Corporation to conceal and omit to disclose and to misrepresent information as to the liability of the corporation to purchase the stock at a price above the then market price and as to payment of unreasonable salaries and compensation and as to losses for bad loans, in the

various reports and statements mailed by them, as officers and directors, to this plaintiff through the United States mail, thereby making said communications in the light of the circumstances, false and misleading with respect to material facts and depriving this plaintiff of her right to know the true circumstances of the corporation.

10. The defendants made untrue statements of material facts and omitted to state material facts in various reports, proxies, financial reports and communications to the plaintiff, which were delivered by mail, which would keep said reports from being misleading, and which contained information which was not concurrent and was untimely, and certain of said defendants negligently permitted or aided and abetted the other defendants in doing these acts, with the intent and purpose of having the stockholders, including this plaintiff, rely thereon.

11. The defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, caused a profitable business, Devoe and Raynolds Co., Inc., a subsidiary corporation, to be sold to obtain cash to carry on their conspiracy to acquire through others the common stock of Merritt, Chapman & Scott Corporation at prices in excess of what the corporation stock was selling at on the market, and in carrying out said scheme and conspiracy failed to advise the plaintiff that said funds from said sale would be used to pay excessive profits to persons with whom they conspired to acquire said corporate stock, thereby using said funds to the detriment of this plaintiff.

12. The said devices, schemes, artifices, untrue statements of material facts, ommissions to state material facts, acts, practices and courses of conduct of the defendants operated as a fraud and deception on plaintiff, in violation of Rule 10b(5), promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934, and were in violation of the said security laws

and the laws of the State of Kentucky and the State of New York, all to plaintiff's damage.

13. The defendants, in their secret guarantees to Joseph Kosow, Isidore Sherman and Archibald Kleven, their joint venturers and partners and to others, guaranteed and paid profits from 20% to 25% on the stock acquired and said defendants should be required to pay this plaintiff a comparable profit and defendants, Kosow, Sherman and Kleven, should be required to account to plaintiff for her proportionate share of the profits illegally and wrongfully made by reason of the conspiracy and to pay plaintiff the damages she has sustained.

14. Plaintiff states that when she purchased the aforesaid 2,050 shares of Merritt, Chapman & Scott Corporation common stock, she relied on, as she had a right to do, the honesty and fair dealing of the company and those who controlled it and plaintiff states that as a result of the conspiracy practiced by the defendants and the fraud and deceit practiced on her and the corporation by the defendants in violation of the said statutes, she has been damaged in her stock interest in said corporation.

V. COUNT TWO.

Plaintiff reiterates the allegations heretofore made and further states:

1. The defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, who are or were during the transactions referred to, officers and/or directors of Merritt, Chapman & Scott Corporation, carried on various transactions with defendants, Joseph Kosow, Isidore Sherman and Archibald Kleven and other persons, in illegally purchasing and having purchased the shares of common stock of Merritt, Chapman & Scott Corporation, in accordance with certain secret guarantees, and such actions were ultra vires and illegal and without corporate purpose, and con-

trary to represented policy of the corporation in diversifying and acquiring profitable enterprises, and in said transactions prevented the corporation from engaging in and carrying out said stated policy, all to the damage of the corporation and this plaintiff.

2. The aforesaid defendants who are or were officers and/or directors of the corporation expended the funds of the corporation in acquiring shares of common stock at excessive prices from persons to whom defendants had made secret guarantees of profit, and in paying excessive prices for acquiring certain assets and corporations from persons with whom defendants conspired, and in paying excessive insurance premiums to persons with whom they as insiders had a close relationship, said expenditures constituted unlawful waste, diversion and gifts of assets of the corporation in violation of their fiduciary duties all to the damage of the plaintiff.

3. The said defendants, as officers and/or directors, occupied a fiduciary position with respect to the corporation of which they were officers and/or directors and owed a duty to said corporation, Merritt, Chapman & Scott Corporation, and its shareholders, including this plaintiff, to exercise a high degree of responsibility toward the corporation and this plaintiff's interest therein, and in their actions as hereinabove set out, breached said fiduciary relationship, causing damage to plaintiff.

4. The said defendants who are or were officers and/or directors of Merritt, Chapman & Scott Corporation caused the corporation to acquire Industrial Finance Corporation, Hub Finance and Congress Finance at prices in excess of their fair and reasonable value, in order to benefit the sellers as against the interests of this plaintiff.

5. The said defendants, who are or were officers and/or directors of Merritt, Chapman & Scott Corporation, conspired with defendant, Joseph Kosow, to acquire Industrial Finance Corporation. Said defendants had dealt with

Kosow in acquiring shares of common stock of Merritt, Chapman & Scott Corporation and had a secret agreement regarding the repurchase from him of such shares at a profit to him. Through the purchase of Industrial Finance Corporation at a cost to Merritt, Chapman & Scott Corporation of $7,000,000.00, the defendants conspired to pay defendant Kosow an excessive price for said corporation, said sum paid being approximately $3,000,000.00 above the fair and reasonable market value of said corporation, unjustly rewarding Kosow and depriving this plaintiff of her proportionate interest in said excessive amount of corporation assets.

6. Plaintiff states that all the defendants, except Kosow, Sherman and Kleven, as officers and directors of Merritt, Chapman & Scott Corporation, brought about the acquisition of Industrial Finance Corporation, Hub Finance Company and Congress Finance Company from defendant, Joseph Kosow and others at an excessive and unreasonable price; that said defendants, through their misrepresentations and concealing of facts brought about the sale of the assets of the subsidiary of Merritt, Chapman & Scott Corporation, known as Devoe and Raynolds Co., Inc., and then changed the name of said subsidiary to Revday, Inc.; that defendants then brought about the sale of Industrial Finance Corporation from Merritt, Chapman & Scott Corporation to Revday, Inc. at a loss to the plaintiff as a shareholder, and subsequently caused and brought about the merger of Revday, Inc. into Merritt, Chapman & Scott Corporation, all to the damage of plaintiff as a stockholder and to the benefit of Kosow.

7. The said defendants caused Merritt, Chapman & Scott Corporation to deposit with the American Security & Trust Company, Washington, D. C., of which defendant, Robert C. Baker, is president, sums in excess of $8,500,000.00, to be used as additional collateral for per-

sonal loans of defendant, Louis E. Wolfson, with the agreement and understanding that said deposits would not draw interest in favor of the Merritt, Chapman & Scott Corporation, when the Corporation was and should have been entitled to interest on such deposit, all to the damage of this plaintiff as a stockholder, and defendants, Robert C. Baker and Louis E. Wolfson, should be required to reimburse plaintiff for her interest thereon.

8. Plaintiff states that as a result of the actions and conspiracy of the defendants she was defrauded and suffered damages, all as more particularly set out below. Plaintiff states that the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub, Robert C. Baker, Robert W. Hoover and Alexander Rittmaster, through their actions in the corporation and on the Board of Directors represented that the corporation was buying in its own stock but that a material fact of the conspiracy was that the stock was being bought by the corporation at a price higher than was required and at a profit to persons with whom said defendant conspired, and that by failing to state to plaintiff in their proxies, reports, financial statements and communications these material facts, such defendants made false representations to the plaintiff. The defendants knew the facts and knowingly made the representations intentionally, leaving out of said representations material facts. Plaintiff states that these false representations were made to induce the plaintiff and others to rely thereon and defendants well knew that if they revealed to plaintiff and other stockholders the scheme and conspiracy they were working, the plaintiff and other stockholders would vote against them or sell their shares. Plaintiff states that the defendants, as officers and/or directors, occupied a fiduciary position to the corporation and to her as a stockholder and she had a right to rely on the fact that they would reveal to her the true and accurate facts. Plaintiff

states that she believed the representations made by the said officers and/or directors that they were buying the stock for the corporation's best interest, and that she had no way to learn or obtain knowledge of the true facts until certain of the defendants were tried in United States District Court of the Southern District of New York on or about August, 1968, wherein it was revealed to the public that the defendants conspired with others to buy said stock and to guarantee to them a profit in an amount of approximately 20% to 25%. Plaintiff states that as a result of said fraud she has been damaged by reason of her inability to properly judge the value of said business and said shares and to take appropriate action in shareholders' meetings and to obtain a reasonable return on her investment.

VI. GENERAL ALLEGATIONS.

1. As to the above two Counts plaintiff states that the corporation is dominated and controlled by defendant, Louis E. Wolfson and his family and persons and corporations which he controls and states that a demand on the corporation to bring an action against the defendant wrongdoers would be futile and useless as said Board of Directors would have to authorize such action and being under the control of defendant Louis E. Wolfson, and said defendant having been a part of said conspiracy herein referred to, said Board of Directors would refuse such action.

2. As to the above Counts, plaintiff states that her action is brought herein as an individual shareholder because any action on behalf of the corporation or by her on behalf of the other shareholders would inure to the benefit of the defendants, and particularly, Louis E. Wolfson, to the extent of their stock interest and such would be futile and unwarranted as they would be profiting from their own wrongs.

3. As to the above Counts, plaintiff states that the defendants omitted to disclose to plaintiff and other stock-

holders the scheme or conspiracy described above, which omission was a material fact necessary to make statements and communications furnished plaintiff not misleading, and but for said omission plaintiff would have had knowledge to guide her in handling her investment.

VII. DISCOVERY OF FACTS ALLEGED HEREIN.

The conspiracy, scheme, device, and fraud alleged herein was not brought to plaintiff's knowledge and was not discovered by plaintiff until the defendants, Louis E. Wolfson, Elkin B. Gerbert, Marshall G. Staub and Joseph Kosow were tried in the Southern District of New York on charges of violating the aforesaid Securities statutes in connection with the facts herein referred to on or about August, 1968. The facts alleged were revealed to plaintiff in the trial of the criminal cases and so plaintiff did not discover the facts alleged prior to one year next preceding the filing of this Complaint. Plaintiff further states that she could not have reasonably discovered said facts and said conspiracy prior to said time as said defendants conspired to keep such information secret.

Wherefore, plaintiff demands:

1. That she be awarded damages against the defendants and each of them in an amount equivalent to the percent profit defendants guaranteed and had the Corporation pay to others with whom they conspired, for the period of time she has held shares, or the sum of $234,333.88.

2. That the defendants be required to account to the plaintiff for her share of such sums as they illegally authorized to be paid by the corporation in carrying out the conspiracy, in acquiring assets at a cost in excess of fair value and in paying out excessive expenses.

3. That she be awarded a sum that would compensate her for the difference in value between the present market value of her stock and the value of said stock had the de-

fendants not perpetrated the conspiracy, waste and fraud on this plaintiff and had used said corporate assets to promote the proper business functions of the corporation.

4. That she be awarded her costs herein and a reasonable allowance for her attorneys' fees, and for any and all other legal and equitable relief to which she may appear entitled.

(s) John G. Hicks,
716 Louisville Trust Building,
Louisville, Kentucky,
Attorney for Plaintiff.

DEMAND FOR TRIAL BY JURY.

Plaintiff respectfully demands trial by jury.
This the 11 day of June, 1969.

(s) John G. Hicks,
Attorney for Plaintiff.

State of Kentucky }
County of Jefferson } ss.

Sandra Lee Simmons Shaw, being duly sworn, deposes and says. that she resides at 428 Hite Avenue, Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing complaint and knows the contents thereof, and that the same is true to her own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

Sandra Lee Simmons Shaw.

AMENDED COMPLAINT.

Comes the plaintiff, Sandra Lee Simmons Shaw, and reiterates and reaffirms the allegations contained in her Complaint herein and for Amendment thereto states as follows:

1. Paragraph III "Allegations Respecting Venue" and Count One, Paragraph II are amended to all the following to each of said paragraphs:

The defendants who were Directors of Merritt-Chapman & Scott Corporation caused the Board of Directors of said Corporation to call its annual meeting of stockholders at the Brown Hotel, Louisville, Kentucky, on April 23, 1962, at which meeting the defendants voted to sell 400,000 shares of stock it owned in Devoe and Raynolds Company, Inc., a subsidiary corporation with main offices and plant in Louisville, Kentucky, thereby reducing the corporation's ownership of said subsidiary from 96% to approximately 65% and that said shares were sold to defendant, Rittmaster and his family, to Sherman and to others at a price of approximately $21.00 per share, which plaintiff believes was below the value of said stock. A copy of said notice is attached hereto and marked "Exhibit A" to Amended Complaint. The defendants, who are or were Directors of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. and who controlled said Corporation caused the said Subsidiary to hold a special meeting of the shareholders on August 27, 1964, at the Brown Hotel in Louisville, Kentucky, copy of Notice of said meeting being attached hereto as "Exhibit B" to the Amended Complaint. At said meeting the defendants through their control of Merritt-Chapman & Scott Corporation voted the Devoe shares held by Merritt and voted to sell the assets of the Subsidiary Corporation, Devoe and Raynolds Company, Inc. Thereafter the defendants through their control changed the name of Devoe and

Raynolds, Inc. to Revday, Inc. and the latter corporation reacquired the stock previously sold to Rittmaster and his family and Sherman, and others, at a price of approximately $42.00 per share, giving said persons a substantial profit at the expense of the Corporation and placing in their hands funds which plaintiff believes were used for acquiring the stock of Merritt-Chapman & Scott Corporation, pursuant to the conspiracy herein alleged. Certain of said funds from the sale of the assets of Devoe and Raynolds Company, Inc. were used to acquire Industrial Finance Company from Merritt-Chapman & Scott Corporation, which finance company defendant Kleven controlled. Thereafter Merritt-Chapman & Scott Corporation merged Revday, Inc. into Merritt. Plaintiff states that these actions and acts which took place in Jefferson County, Kentucky, were part of the conspiracy herein alleged and enabled the defendants to obtain funds to carry out the purchases herein referred to, all being part of the conspiracy herein alleged.

Wherefore, plaintiff demands as in her original Complaint.

John G. Hicks
716 Louisville Trust Building
Louisville, Kentucky
583-7655
Attorney for Plaintiff

State of Kentucky }
County of Jefferson } ss

Sandra Lee Simmons Shaw, being duly sworn, deposes and says that she resides at 428 No. Hite Ave., Louisville, Kentucky; that she is the plaintiff herein; that she has read the foregoing Amended Complaint and knows the

contents thereof, and that same is true to her own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters she believes them to be true.

(s) Sandra Lee Simmons Shaw